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The Right To Asylum and The Indochinese Refugee

Edmond L. Papantonio*

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Edmond L. Papantonio

Abstract

This note is concerned primarily with asylum, i.e., the acceptance of an individual by a country of refuge, as well as how a refugee is to be treated after asylum has been granted. Although each of these issues can be analyzed in both legal and moral terms, the lack of any enforcement agency of procedures restricts their efficacy as rights in the traditional legal sense. Ultimately, as moral rights, their effectiveness depends upon the generosity of the accepting nation.

THE RIGHT TO ASYLUM AND THE INDOCHINESE

REFUGEE

I. INTRODUCTION

Since the spring of 1975 over 300,000 people have fled the Communist states of Indochina.¹ Journalists have recorded the reasons—from unspeakable atrocities in Cambodia to economic hardships throughout the region—and documented the perils of their flight. Although definitions of precisely who is a refugee differ,² a purely academic approach distances the observer from the fear and courage inherent in cutting one's roots and fleeing one's native land. This note is concerned primarily with asylum, i.e., the acceptance of an individual by a country of refuge, as well as how a refugee is to be treated after asylum has been granted. Although each of these issues can be analyzed in both legal and moral terms, the lack of any enforcement agency or procedures restricts their efficacy as rights in the traditional legal sense. Ultimately, as moral rights, their effectiveness depends upon the generosity of the accepting nation.

A fundamental principle in international law is that each state is granted exclusive control, based on its own territorial sovereignty, over the persons within it.³ In the absence of treaty obligations, a

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1. U.S. Dep't of State, Indochina Refugees, GIST 1 (July 1978).
 2. 1A. Grahl-Madsen, The Status of Refugees in International Law. (74-75 (1972) combines the definitions of the Institut de Droit Internationale (1936) and J. Hope Simpson to isolate what he considers four essential elements of a refugee: the individual must have (1) left his country of regular residence (2) because of political events, and (3) it must be difficult or impossible for him to return. He must have (4) no new nationality. To these S. Prakash Sinha, Asylum and International Law 95 (1971) adds two more elements: the political events which force him to (1) take refuge in another state must have (2) occurred between the state from which he fled and its citizens.
 3. Sinha, supra note 2, at 50.

state is neither bound to admit nor prevented from admitting anyone.⁴ Each nation has the power to admit or exclude whomever it pleases for whatever reasons it pleases,⁵ e.g., admission may be motivated by either political expediency or humanitarian considerations.⁶ An individual refugee cannot enforce his own rights against the state of proposed refuge.⁷ Even states sympathetic to the refugee are limited in the aid they can give him, for such states' alternatives are confined to belligerent or coercive acts, which would imperil their own relations with the state of refuge.⁸

II. INTERNATIONAL INSTRUMENTS DEALING WITH ASYLUM

Despite the fundamental lack of enforceability, nations have chosen to draft and sign multilateral conventions, bilateral or regional treaties, and less important agreements and protocols with respect to

4. Id. at 50, 155-56.

5. Id. at 50. Recently Switzerland has redrafted a law to broaden the category of someone considered eligible for asylum. The draft replaces the concept of a person possessing a "well-founded fear of persecution" with the notion of someone who may suffer "serious prejudice" in his state of origin. 4 UNHCR 3 (July 1977).

6. Sinha, supra note 2, at 50.

7. Id. at 126.

8. Id. The truth of this proposition is well-illustrated by recent events in Indochina. Asserting it was acting on behalf of individuals in whom it had an interest, in the latter part of 1978 the People's Republic of China attempted to influence official Vietnamese behavior towards holders of Chinese passports (specifically) and ethnic Chinese (broadly) resident in Vietnam. Although this was not a refugee situation, for the persecution allegedly originated from the government of the nation in which the victimized individuals were resident, it shows the relative impotency of a nation's attempting to enforce the rights of individuals not on its soil. First the Chinese protested, and when that proved inadequate, closed Vietnamese consulates in China. Finally, they felt the only way to "teach the Vietnamese a lesson" was to invade the country. This would be a dangerous and costly maneuver for an otherwise disinterested third state. See generally Time Magazine (January 1978 - January 1979).

the treatment of refugees. The United Nations charter does proclaim that the observance of universal respect for human rights is an aim of the United Nations.⁹ The charter, however, does not specify any particular rights (including asylum), does not provide any machinery for the maintenance of human rights, and is too broad to permit implementation of measures protecting human rights.¹⁰ Since the General Assembly has no power to legislate in such fields as human rights which would bind member states,¹¹ the exhortation of the charter must be seen as merely a guiding principle.¹²

The Universal Declaration of Human Rights,¹³ although more specific in defining human rights, is similarly limited. Article 14.1 clearly states "everyone has the right to seek and to enjoy in other countries asylum from persecution."¹⁴ It does not, however, establish a right to be granted asylum¹⁵ or impose a legal obligation on states;¹⁶ rather it is merely a proclamation of a common standard of achievement to be sought by all states.¹⁷ At best, it can be of "passive legal value;"¹⁸ its effect can be only that of moral persuasion.¹⁹

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9. U.N. Charter art. 55 (c).
 10. Id.; Sinha, supra note 2, at 89-90.
 11. Grahl-Madsen, supra note 2, at 40.
 12. Kunz, The United Nations Declaration of Human Rights, 43 AM. J. Int'l L. 316, 317-18 (1949).
 13. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948).
 14. Id. at art. 14.1.
 15. Language asserting such a right was stricken from the draft. Sinha, supra note 2, at 109.
 16. Kunz, supra note 12, at 321.
 17. Id. at 321; Sinha, supra note 2, at 90.
 18. Grahl-Madsen, supra note 2, at 41.
 19. Kunz, supra note 12, at 321.

The Geneva Convention Relating to the Status of Refugees,²⁰ the most important document dealing with refugees, does not, on its face, speak of the right to asylum. Rather, it only specifies the economic and social rights due an individual who has already been granted asylum, e.g., association, employment, housing and property.²¹ Even more than the right to asylum, these rights are dependent not only on the economic resources of the state of refuge, but also on its own social structure and cultural attitudes.²² It is highly unrealistic to attempt to impose obligations of support of an ever increasing number of refugees upon any nation, much less ones with developing economies.

The Convention does purport to impose a contractual duty on signatory nations to cooperate with the United Nations High Commission on Refugees (UNHCR).²³ Its most significant provision affirms the principle of non-refoulement (non-expulsion) by stating that signatory nations "shall not expel a refugee lawfully in their territory save on grounds of national security or public order."²⁴ If an effort is made for those reasons to expel a refugee, it must be done in accordance with due process of law.²⁵ To take advantage of this provision, however, an individual must have entered the territory legally.²⁶ Article 33 is more specific: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where

20. Convention Relating to the Status of Refugees, July 28, 1951, arts. 2-34; 189 U.N.T.S. 137, 150-76; T.I.A.S. No. 6577.

21. *Id.* at arts, 15, 17, 18, 21, 14, 30.

22. Sinha, *supra* note 2, at 119.

23. 4 UNHCR 2 (July 1976).

24. Convention Relating to the Status of Refugees, July 28, 1951, arts. 32(1); 189 U.N.T.S. 137, 174; T.I.A.S. No. 6577.

25. Sinha, *supra* note 2, at 110.

26. *See Id.* at 110-11.

his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."²⁷ This stops short, however, of requiring a state to admit a refugee.²⁸

Two American lawyers, Lieberman and Krinsky, have interpreted Article 33 as creating a right to asylum in certain cases.²⁹ First they maintain that a refugee need not have entered the country legally to take advantage of its benefits.³⁰ Another authority would support this interpretation.³¹ Lieberman and Krinsky continue, however, to assert that Article 33 creates an absolute right on the part of good faith refugees against return to the country of persecution, although the host country may expel the refugee to a third country. If no third country is willing to accept the refugee, then he must remain in the country of asylum.³² For these writers, the issue is the validity of the individual's status as refugee. Consideration of the refugee's state of mind and inferential argument by counsel should all bear upon determination of such status.³³

Sinha disagrees with their declaration of an absolute right to asylum.³⁴ He seems to adopt the position of the UNHCR, which has stated that the 1951 Convention does not regulate asylum.³⁵ Most realistic is Sinha's conclusion that "[t]he final situation, however, remains that there is no international instrument of binding character which obliges a state to admit refugees to its territory."³⁶

27. Convention Relating to the Status of Refugees, July 28, 1951, arts. 33; 189 U.N.T.S. 137, 176; T.I.A.S. No. 6577.

28. Sinha, supra note 2, at 110.

29. Lieberman and Krinsky, Political Asylum and Due Process of Law: The Case of the Haitian Refugees, 33 Nat'l L. Guild Prac. 102, 105 (1976).

30. Id. at 104.

31. See Sinha, supra note 2, at 111.

32. Lieberman and Krinsky, supra note 29, at 104.

33. Id. at 106-07.

34. Sinha, supra note 2, at 110.

35. 4 UNHCR 2 (July 1976).

36. Sinha, supra note 2, at 110.

The international instrument which has come closest to asserting a "right of asylum" is the Declaration on Territorial Asylum.³⁷ While confirming the principle of non-refoulement, it speaks of the moral duty of states not to reject bona fide refugees at their frontiers whether they have entered the country or not.³⁸ This is merely a declaration and has no binding force. Hopes that the 1977 United Nations Conference on Territorial Asylum would establish a convention which strengthened a refugee's legal right to asylum³⁹ were frustrated when the conference ended without framing a convention.⁴⁰

III. THE INDOCHINESE REFUGEE

Indochinese refugees fall into two categories: those who escape overland into Thailand from Laos and Cambodia, and those who escape by small boat.⁴¹ The first group appears to have fared better, for in general they have been accorded asylum in Thailand. As of July 1978 more than 100,000 still remained in Thai refugee camps:⁴² The second group, the boat people, who are almost exclusively Vietnamese, face a more uncertain future. If fortunate, they may reach Malaysia or Thailand, where authorities generally let them dock, but sometimes restrict them to their boats. Recently, even these nations have turned them away, forcing these boats to remain at sea.

Because asylum is such a tenuous right, certain ships captains have ignored boat people in distress on the high seas, for fear that once they are aboard the rescuing ship, they will not be allowed to

37. Declaration on Territorial Asylum, U.N. Doc. A/RES/2312 (XXII) (1967) cited in Sinha, supra note 2, at 162, n.1.

38. 2 Grahl-Madsen, *The Status of Refugees in International Law* 102 (1972).

39. 4 UNHCR 3 (July 1976).

40. 1 UNHCR 8 (Feb. 1977).

41. U.S. Dep't of State, Indochinese Refugees, supra note 1, at 1.

42. Id.

disembark at any port on the ship's route.⁴³ The former High Commissioner on Refugees, Sadruddin Aga Khan, has appealed, through the International Chamber of Shipping, to merchant ships to honor the "traditional obligation" to go to the aid of persons in distress on the high seas,⁴⁴ and has urged

the countries where these unfortunate people first seek asylum to adopt a more humane attitude towards their plight. I say this because although some countries in Asia have shown remarkable understanding and generosity in granting temporary asylum, there are others that are sometimes unduly formalistic and inflexible in their attitude. This has also had a negative effect upon the willingness of captains of ships to rescue people on the high seas — a situation that one cannot but deplore.⁴⁵

Thailand and Malaysia are the primary countries of initial asylum.⁴⁶ They have established numerous camps where, with the aid of the UNHCR and other nations, refugees are housed and fed.⁴⁷ As of August 1978 there were approximately 114,000 land refugees in Thailand and 15,000 boat people in Malaysia.⁴⁸ Despite the fact that Malaysia has resettled some Cambodians in its State of Kelantan,⁴⁹ these refugees present numerous political, economic, and security problems, and the ultimate solution will have to rest in third countries granting asylum to them.⁵⁰ The United States has accepted 172,000 Indochinese refugees since 1975,⁵¹ has recently authorized the admission of 25,000 new refugees, and is considering amending its Immigration and Nationality Act to permit up to 25,000 Indochinese refugee admissions per year, as

43. 5 UNHCR 1 (Oct. 1977).

44. Id.

45. 4 UNHCR 6 (July 1977).

46. See Id. at 5; 5 UNHCR 1 (Oct. 1977).

47. 4 UNHCR 6 (July 1977).

48. U.S. Dep't of State., The Indochinese Refugee: A Status Report, 30 Current Policy 1 (Aug. 1978) [hereinafter cited as Status Report].

49. 5 UNHCR 5 (Oct. 1977).

50. 4 UNHCR 6 (July 1977).

51. U.S. Dep't of State, Refugees: U.S. Policy, GIST 1 (July 1978).

well as expanding the Attorney General's parole power to admit refugees.⁵² Both the United States and UNHCR are encouraging other nations such as Australia, France, and Canada to expand their efforts in accepting refugees and increase their monetary contributions to UNHCR aid programs.⁵³

IV. CONCLUSION

To speak of asylum in purely legal terms is to miss its essence, for it is a moral right that cannot be effectively enforced — the refugee is dependent upon the generosity of the state where he seeks refuge. One may argue that third countries' accepting refugees from countries of initial asylum tends to stabilize these latter nations by reducing economic and social burdens on them as well as minimizing friction with their neighbors. Ultimately one cannot speak of legal obligations, but must rely upon the humanitarian sentiments of accepting nations to help restore to refugees the human rights they sought in fleeing their homelands.

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52. U.S. Dep't of State, Status Report, supra note 48, at 5-6.

53. See Id. at 6.